# Virginia Law Register

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## "ONE-JUDGE" DECISIONS IN COURTS OF LAST RESORT.

A MEMORIAL TO THE SUPREME COURT OF ALABAMA BY A COMMITTEE OF THE ALABAMA STATE BAR ASSOCIATION INSISTING THAT EACH CASE BE DECIDED BEFORE AN OPINION THEREIN IS WRITTEN. PRESENTED NOVEMBER 25th, 1913.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:*

We come at the behest of the State Bar Association to give respectful expression to its view that great good will be accomplished by this court deciding each case submitted to it, before any justice knows who is to write the opinion. At the last meeting of the association its president in his annual address gave fitting expression to the profession's appreciation of the new order of procedure and rules adopted by your honors looking to the determination of causes upon their merits, unembarrassed by hampering niceties of procedure. His discussion disclosed ample historical warrant for the action you have taken and made manifest its timeliness. His view, which by formal vote, the association made its own, is thus summarized:

> "The effect will be productive of better considered and more accurate decisions; it will tend to make better lawyers and greater judges."

We are commissioned by the only organization empowered to speak for the Bar of this State to come before you to express appreciation for what you have done, and to ask that you take one step further in the same direction. Our credentials are this resolution of unanimous adoption:

> "Whereas, one of the rules recently adopted by the Supreme Court embraces a step towards the establishing of a system whereunder cases will be considered and decided by

the court before an opinion is written by one of the judges, which is the only effective method of abolishing the 'one judge evil;' therefore be it

"Resolved, That the aforesaid action by the Supreme Court is hereby endorsed, and the court hereby earnestly requested to adopt, as soon as possible, a procedure whereunder every case will be considered and decided by the court before it is referred to a Justice for the preparation of an opinion.

"Resolved, further, that the president of this association do appoint a special committee composed of three members to represent the associ tion in presenting this matter to the court, and urging the adoption of the aforesaid procedure."

By the new rules you have required the appellant to state the facts of his case, which are to be accepted as stated, unless the appellee shows them inaccurate by reference to the transcript. You have required a statement of the points and authorities in succinct and unargumentative form, and have required that a sufficient number of these condensations be supplied for each justice to have a separate copy before him. The lawyers are thus to agree upon the facts, or to narrow their differences to the smallest compass. With the facts thus presented and the divergent theories of law concisely arrayed one against the other, will the task of a preliminary discussion involve greater labor, or a larger consumption of time than is required by the system of advance opinions which now prevails? Is the task of analysis and differentiation in a give-and-take of general discussion more laborious than the existing method of having half-blindly to weigh and criticise a legal essay written by the one member of the court who has formulated conclusions from a vantage point denied his auditors? The labor involved in discussing and deciding the case in council and there working out the general scope and purposes of the opinion, and then delegating to one justice the task of voicing the court's announced judgment will, we apprehend, be no greater than that required under the existing rules of the court. But, if there be added labor, if more time be required, there is recompense in that the whole of the independent character and judgment of each justice is brought to the decision of each

case, and nothing is warmed over, or warped by the individual idiosyncrasies of mind and temperament from which not even judges are immune. The results to be attained are worth all the labor and all of the time that a thorough preliminary consideration may require. Among these results are:

A return to the confidence-inspiring position courts long maintained by making their decision the composite product of the good and learned men whom the people chose as their chief magistrates.

It is grounded in human nature to distrust one man's judgment in dealing with the affairs of another man; hence throughout all our civilization, appellate courts have been composed of three or more, and juries of twelve men. The kings of old had their wise men, and the modern ruler summons the cabinet or ministers for council, not merely the head of the department to which the matter in hand belongs.

The existence of reviewing courts is justified only by that power which comes from a concert of mentalities working each to complement the other—each to aid the other to overcome individual weakness, selfish bias and personal peculiarities. Where one is experienced another is untutored. Where one is analytical another is synthetic. Where one gives perspective another works out details. The extremes of one are disarmed by the contrary extremes of the other. There is magic in the cordial and natural touch of mind and mind. There is God-given power in eye to eye and voice to voice.

If it be urged that these are platitudes and nothing worth because they all result from what follows after the reading of the product of the judge who has written the case, we say: What follows is not conference, but criticism. The one is born in a spirit of mutual respect and kindliness; the other has, by the unalterable conditions of man's makeup, an element of the unkind. "Let us reason together" is far different from "let us criticise each other."

No man can produce a writing without having for it a feeling akin to fatherhood. No gentleman finds pleasure in the criticism of another's off-spring. Every man worth while has in him a quality different from that of every other man. This,

for want of a better name we call individualism. And this, his own distinctive quality, every man loves. So are we made. This individualism is cloistered with a record, and with it cogitates, and reads, and writes, and wrestles, without note of the mental processes, doubts and queries which would be suggested by associates did they share the task. The product is his and his alone. The judge is lost in the advocate, and as an advocate he enters the consultation room with an equipment of information and special research which gives him an undue and dangerous advantage over any brother disinclined to accept a prepared confession of faith in the forming of which he had no part. The participants in this aftermath to special individual labor do not reason together. One has reasoned for all

Discussion and decision before the case is written will avoid the delegation of a responsibility which should never be delegated.

Of all functions with which mankind is invested, the judicial function is the most utterly destitute of any delegable elements. No formal or informal system of referees or commissioners is recognized by either the spirit or the letter of our constitution. One judge has no more right to ask another judge to decide, even tentatively, for him, than he has to substitute an outsider. How vital this particular branch of the subject is, this court may best appreciate by considering the proportion of tentative opinions which become "endorsed without recourse." When the court makes one member the keeper of its conscience, no matter how guardedly or provisionally, it thereby commits itself tacitly, in advance, to accord to the result a *prima facie* presumption of correctness which makes dissent difficult and suggests acquiescence.

The value of a preliminary discussion, in which each contributes of his special gifts, and special accomplishments and experience, right at the threshold and before the writing of any opinion—producing well nigh ineradicable prepossession —cannot be over-estimated. Such discussion would tend to a rational, and a satisfying, and a reassuring decision; and the opinion would not be strained, hesitant, protesting, attempting to convince the unconvinced. It would speak as "one having

authority, not as a scribe." It would promulgate a union of judgment and precision.

Opinions so rendered are definite declarations commanding acceptance as settled and stable. They do not encourage variant judicial utterances, because they neither parade nor antagonize individualism. The judge who in later months or years comes to these declarations finds fewer discordant elements and is less spurred to array his originality against another's initiative.

How can a judge comfort himself with the reflection that he is not responsible for deciding my case wrong because he did not write the opinion, and yet reproach himself bitterly for the injustice done in your case because he did write that opinion? Did he not vote on both cases, and was not his vote in my case as potent as in yours? Where is the warrant for gradations in degrees of responsibility among appellate judges who vote all one way?

A wrong decision by the court of very last resort is a tragedy. It takes from one man that which belongs to him, and destroys his confidence in the very existence of such a thing as justice. It confers upon another that to which he is not entitled, and rewards his predatory pursuit, or his iniquitous defense, and gives him a taste for the forbidden fruits of the pirate and the highwayman. Or it may take from a citizen his life, leaving upon his name and his descendants the brand of eternal infamy, or save the life that is rightfully forfeited, and vindicate a desecration of the sanctuary of justice. Compared with the responsibility for bringing about such results, all others are light and trivial. Then, if there is anything in the permanency of first impressions, in the advantages of a good start, and in the supreme importance of the correct inclination at first, the time to safeguard against error in the appellate court is at the outset of the process. The cake that receives the first stage of its baking in an oven too hot or too cold, is marred beyond remedy. The opinion that is well started in the wrong direction, is rarely righted, and then only after irreparable wrong has been done.

The course which it has become our duty to suggest to your

honors would increase the capacity of each judge for public service and enhance the influence of the court as a whole.

The chain is no stronger than its weakest link, because each link does its work alone. For the same reason a court working under the advance assignment method is measured by its weakest judge. A court which does the team work of advance consideration supplements the weak with the strength of the strong, and its measure of usefulness may well be that of its strongest judge. The newly elected sooner become worthy components of a worthy whole. The training of the judge of long experience becomes of greater value to the state.

Decisions in which all participate on an equal footing will lighten the burden of responsibility upon each justice, while the responsibility for each decision is increased. No justice need ever feel more responsible than his brethren for any output of the court.

The adoption of the rule set forth in the resolution of the Bar Association would, we believe, give added zest to the work of the court, and permeate its output with new heartiness and vigor; for interest and enthusiasm are the mainspring of all effective labor. There is something deadening in this advance assignment of records. The disposition of one justice to consider the cases which are assigned to him as his special *protègès* leads to something like comparative indifference to the *protègès* of the other justices. The outcome of it all is that the average case gets the thorough consideration of only one man. No case has the attention of the attendants provided for it by law. If the boys are the special pets of the father, and the girls the special favorites of the mother, no child enjoys the intense solicitude of the two parents which is its right, and the whole brood are semi-orphans.

When a justice knows that he is not to write the opinion in a given case, the tendency is towards a rather perfunctory reading of prosaic briefs. His discussion of the opinion when brought before him is liable to be likewise perfunctory, and in such discussion his impression of the points is apt to be rather obscure. The confidence which the non-writing judge may feel in the writer makes him the readier to take things for

granted, and so lessens his interest. To this natural half-interest in the product of the solitary hours of another we attribute much of the conflict in the decisions. We remember what we have helped to mould, and are apt to forget that to which we have given passive assent. There is a difference between fighting a battle and reading about it. Much uncertainty comes from sheer forgetfulness of the court's previous decisions. The opinions as written under the prevailing system are confusing because replete with arguments which are not always consistent one with the other, and for no one of which any responsibility is assumed. Such opinions suggest the possibility of conflicts in principles, and invite experimental litigation.

If a general discussion should follow close upon the study of the record by each judge, with his impression vivid, and his interest keen and freshly roused, the memory of one judge would supply the lapses of another. The general rule would be sure to find the exception properly declared. The general current would be stayed by due emphasis of special facts which might escape the notice of a solitary worker. When one Homer nods another ought to be alert. If each justice takes a spirited rather than a passive part in a decision, his impression of the court's attitude will linger longer and more distinctly; and the concise opinion which would emanate from such discussion would be remembered long after one less connected and more heavily laden with argument would be forgotten.

We think that the number and length of opinions would be decreased by the adoption of this suggestion of the Bar Association.

Opinions, and sometimes long ones, are now written only to reiterate well settled principles. Such opinions usually are written for the purpose of calling the attention of fellow judges and of the profession to the thoroughness of the writer's research and the invulnerable strength of the conclusions in which he asks his brethren to concur,—all unnecessary had the line of controlling decisions been considered in an advance-discussion, and the case disposed of by mere reference to one or more of those decisions. An opinion emanating from discus-

sion should, in smallest compass, announce the reasons for the decision, with limited reference to authority, and in it there is no place for diversified argument. It need not be bulwarked as are the advance briefs, which may or may not become opinions, for the conference would determine not only the destination but also the route to be traveled.

The profession in Alabama is hungering for opinions of the court. It is wearied by travelling through many pages of writing which are repudiated as opinions of the court by a concurrence limited to conclusions. Its patience has been taxed by long essays which conclude with an announcement such as this: "The foregoing expresses the views of the writer, but other members of the court entertaining different views, the cause is affirmed." It is hard to learn the law from the perusal of laborious statements of what is expressly declared not to be the law. It has been said of decisions arrived at by advance parcelling out of the records, "What deference can we expect will be paid to the judgments of a court which habitually refrains from forming any opinion of its own as a court and contents itself with issuing the individual paper of each member in turn endorsed without recourse?" But worse than this, we have come in Alabama to where the court frequently declines to endorse even without recourse.

The former achievements of this great court have not been absent from our minds. The fame and the epoch-making opinions of the incomparable justices who have adorned this bench rise unbidden before our mental vision. None realize more keenly than we that if some great disaster should sweep the results of their labor and the record of their genius from the libraries and minds of men, the science of jurisprudence would sustain a staggering blow, and the irreparable loss would be bewailed wherever the English tongue is heard, or the common law administered.

However, any argument that the suggestion which we bring should not be heeded because the distinguished career of this court was achieved without any such rule as that which we now advocate, would be fallacious. The tree flowers and fruits abundantly while the deadly parasite is imperceptibly sapping

its vitality. The foundations and much of the symmetrical superstructure of the common law were constructed while the right to demand and enforce barbarous and superstitious procedures was recognized as sacred. Even the church has survived the thumbscrew, the rack, and the inquisition. The law and the church have survived because those excrescences have *not* survived.

That the old order of a glorious era of this court was defective, if not vicious, the inauguration of the new regime requiring the reading of the briefs, and, in effect, of the record, by each of the justices, under certain conditions, conclusively adjudicates.

The increase of population, wealth, utilities, and the refinement of differentiations in all lines, with consequent increase of litigation, are partly responsible for radically different conditions surrounding the search for truth. The strenuousness of the age is responsible for raking up every shred of circumstance, for drawing every inference, for sifting every witness; and has accentuated the tenseness of forensic strife.

The present instantaneousness of communication, and the rapidity with which words are committed to paper; increase loquacity in business and in the courts. Such multitude of incidents, such infinity of cross-currents of facts and precedents, and such a wilderness of detail, have vastly multiplied the difficulty of keeping a firm and comprehensive grasp upon a case, and have also multiplied the difficulties of avoiding serious errors and mistakes, requiring increased precautions and vigilance.

Something akin to the foregoing considerations have doubtless contributed to the requirement in other states, where the business is equally as great, and the work as onerous, of departures like that for which we clamor. The rule of requiring decision before opinion prevails in the following states, where the number of the decisions per year is as follows:

Kentucky: 1,000 to 1,100 decisions and opinions.
Georgia: 700 decisions and opinions, with three judges.
Michigan: 600 decisions and opinions.
Arkansas: 575 decisions and opinions, with five judges.

North Carolina: 600 decisions, 520 opinions.
Kansas: 640 decisions, 521 opinions.
Pennsylvania: 500 opinions and decisions.
Iowa: 550 decisions, 455 opinions.
Minnesota: 500 decisions, 400 opinions.
Missouri: 350 decisions and opinions.

Other courts with smaller numbers of opinions, namely, Massachusetts, Vermont, Rhode Island, Maine, Mississippi, New Jersey, Nebraska, Connecticut, Wisconsin and Ohio, all sanction the draft of no court opinion until after arrival at a decision. In Oregon, Oklahoma and Indiana, the pre-decision rule is in force, though not as unbendingly as in the other states named.

The Supreme Court of Alabama, during the last judicial year, decided 515 appeals and original applications, each judge being presumed to read the record or take part in consultation only after a specially designated judge had prepared the opinion. Alabama was surpassed in number of opinions by the court of Kentucky, Georgia, Michigan, Arkansas, North Carolina, Pennsylvania and Iowa, the Supreme Court of the United States, and most of the Circuit Courts of Appeals, and every one of their judges is supposed to have studied each case by perusing the record and briefs, and to have assisted in the actual decision of the cases, in consultation, before an opinion had forecasted a cut and dried *decision*. Of the 515 decisions put out by this court, probably a large number were accompanied by mere memorandum opinions.

We present these figures to show that a departure is practicable for a heavily burdened court. The above information has been placed before us in the original handwriting of the chief justice, or other officer, of each court named.

The court most severely taxed with respect to the importance of the cases submitted to it, and the fierce light that beats upon it, as well as the number of controversies clamoring for adjustment, is the Supreme Court of the United States. The adoption of the very best method of disposing of its business early became vital to the existence of that court. It adopted

the method for which we now contend, and to that method it has steadfastly and successfully adhered.

The new and improved method of procedure has greatly increased the labors of the lawyers of Alabama. This they have cheerfully accepted as their contribution to a higher standard of appellate work. Does not their acceptance of that burden entitle this, the petition of their organization, to consideration and a formal ruling by this honorable court?

Respectfully submitted,

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HENRY FITTS,
E. W. GODBEY,
Committee.

**Note.**

Editor Virginia Law Register: The foregoing memorial addressed to the Supreme Court of Alabama by a committee of the Bar Association of the State seems well worth a place in your pages. The end sought by the memorial is the abolition of the very prevalent evil of "one-judge" decisions in courts of last resort. The viciousness of this practice is strikingly portrayed in the committee's argument. Members of the bar have long recognized the need of reform in this direction, but from a sense of timidity or of delicacy have been content to complain of the evil in private, with little or no public or concerted effort at reforming it. The profession at large is indebted to the Alabama Bar Association for the present admirable Code of Ethics of the American Bar Association—a Code which has been accepted very generally by the bar associations throughout the Country. A similar debt of gratitude is owed to this same association for its propaganda for reform in the "one-judge" evil. The readers of the REGISTER will find this memorial well worth a careful and sympathetic study.

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